IN THE

Supreme Court of the United States

October Term 1976

No. 76-238

THE NATIONAL FARMERS' ORGANIZATION, INC.
Petitioner,

v.

UNITED STATES OF AMERICA AND ASSOCIATED MILK PRODUCERS, INC.
Respondents.

REPLY BRIEF OF NATIONAL FARMERS' ORGANIZATION, INC. ("NFO") IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

WORTH ROWLEY
JOHN P. MCKENNA
RICHARD GREEN
AARON B. KAHN
ROWLEY & SCOTT
1990 M Street, N.W.
Washington, D.C. 20036
(202) 293-2170

Attorneys for Petitioner
National Farmers' Organization, Inc.

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CONTENTS

	Page
Introduction	1
Argument	2
I. The Need for Clarification of the Standard by Which the Adequacy of the Government's Representation Is To Be Judged	2
II. The Requirement of Discovery and an Evidentiary Hearing	10

TABLE OF AUTHORITIES

CASES:

Bradley v. *School Board*, 416 U.S. 696 (1974) 8

Cascade Natural Gas Corp. v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967) 2, 4-6

Sam Fox Publishing Co. v. *United States*, 366 U.S. 683 (1961) 2, 4, 6, 9, 10, 12

S.E.C. v. *United Benefit Life Ins. Co.*, 387 U.S. 202 (1967) 6

Trbovich v. *United Mine Workers*, 404 U.S. 528 (1972) 5

United States v. *International Tel. & Tel. Corp.*, 349 F. Supp. 22 (D. Conn. 1972), *aff'd per curiam sub nom. Nader* v. *United States*, 410 U.S. 919 (1973). 10

FEDERAL RULES OF CIVIL PROCEDURE:

Rule 24(a)(2) 9, 12

STATUTES:

Antitrust Procedures and Penalties Act, Pub.L. 93-528, 88 Stat. 1706, 15 U.S.C.A. § 16(b)-(g) (Supp. I, 1975), § 29 Note (Supp. I, 1976) 7, 8, 15

Page

MISCELLANEOUS:

Hearings on H.R. 9203, H.R. 9947, and S. 782 Before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary, 93d Cong., 1st Sess. (1973) 8, 13

H.R. 9947, 93d Cong., 1st Sess. (1973) 8

S.Rep. No. 93-981, 93d Cong., 2d Sess. (1974) 14, 16

Sulivan, *Enforcement of Government Antitrust Decrees by Private Parties,* 123 U. Pa. L. Rev. 822 (1975) 10

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INTRODUCTION

We presented two basic questions in our certiorari petition. We have tried to structure this Reply accordingly by grouping the points made by the Government and AMPI in their oppositions under the question to which they appear to relate. The grouping, however, necessarily has been somewhat arbitrary because many of their points do not really have anything to do with the questions presented in our Petition. They amount rather to an assumption that a bad faith standard is

controlling, joined with a plea on the merits—which this Court is asked to take on faith—that neither the Government nor AMPI is guilty of any wrongdoing.

ARGUMENT

I. The Need for Clarification of the Standard by Which the Adequacy of the Government's Representation Is To Be Judged.

We have urged that, primarily as a result of this Court's treatment of the issue in *Sam Fox Pub. Co.* v. *United States,* 366 U.S. 683 (1961), and *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.,* 386 U.S. 129 (1967), and in its per curiam affirmances of divergent district court decisions, "there is still nothing even approaching a workable, authoritative standard by which adequacy can be measured." *See* Petition at 28-32. We have also urged, as a necessary concomitant, that the standard applied by the court of appeals requiring one seeking intervention to show that the Government acted in bad faith in negotiating and accepting the decree is illusory and unworkable, confuses the procedural question of intervention with the substantive question of approval of the decree, and would effectively preclude intervention in consent decree proceedings. *See* Petition at 34-35.

The Government begins by urging that the court of appeals did not require a prospective intervener to prove[1] that the Government had settled the case in

[1] The Government purports to see some significance—without explaining what it is—in the Petition's characterization of the court of appeals as having required a "conclusive showing" of bad faith. *See, e.g.,* Government Brief at 7. At the risk of belaboring the obvious, the phrase "conclusive showing" as used in the Petition is intended to refer to the court's holding that an intervener must prove or show bad faith (i.e., establish it to the satisfaction of the district court) as opposed merely to claiming or making a "threshold" or "prima facie" showing. In line with this, the Petition also characterizes the standard applied below as requiring an "affirmative showing" (at 20), "proof of bad faith" (at 26), "proof of wrongdoing" (at 35), and "proof that the Government acted corruptly" (at 35).

bad faith. "Fairly read," says the Government, the opinion required only a "prima facie" showing of bad faith. Government Brief at 7-8. AMPI, we note, reads the lower court opinions as requiring a "clear showing." AMPI Brief at 30.

The Government's position suffers, we submit, from the confusion that permeates the adequacy of representation issue. To begin with, it is not clear whether the Government is arguing that a prima facie showing of bad faith would entitle one to intervention, or merely to discovery and an evidentiary hearing at which the applicant would still have to convince the district court that the decree in fact was negotiated and accepted in bad faith. The Government also is unclear whether the showing to which it refers is a "prima facie" one or merely "a threshold" showing, referring to it both ways. *See* Government Brief at 8. And finally, whatever the correct interpretation(s) of the Government's position, it is proffered to this Court with a string on it in the form of an "assuming without conceding" caveat. *See* Government Brief at 8.

Of course, the notion of a prima facie or threshold showing is the Government's invention. It is not the standard applied by the court of appeals and does not appear in that court's opinion. *See* App. A. The court of appeals held, quite simply, that bad faith on the part of the Government "must be shown before intervention will be allowed." App. A at 9a. The Government apparently recognizes that this holding is in-

defensible for the reasons outlined in our Petition (at 34-35), and has felt compelled to modify the court's opinion. This in itself is persuasive evidence of the prevailing uncertainty and need for authoritative clarification and guidance from this Court.

The Government's argument about a prima facie or threshold showing also begs the question. The Government assumes a "bad faith" standard when selection of the appropriate standard is the very point at issue, and goes immediately to a discussion of how strong the showing must be.[2]

Both the Government and AMPI provide additional support for the Petition in their treatment of this Court's decisions. The Government, for example, concedes that *Cascade* is inconsistent with the bad faith standard supposedly mandated by the *Sam Fox* dictum, but seeks to rationalize it as "another exception." Government Brief at 8 n.7. AMPI's convolutions are even more revealing, as well as entertaining. They begin with the discovery that *Cascade* "did serve to clarify the standard for intervention." AMPI Brief at 21.[3] Alas, this discovery, which is worthy of a Columbus, turns out to be illusory, because AMPI quickly shifts

[2] The bulk of AMPI's argument also amounts to a brief on the merits in favor of a rule precluding intervention. *See, e.g.,* AMPI Brief at 18-21. AMPI posits an illusory and imaginary alternative of permitting intervention of right to anyone who disagrees with the terms of the decree. *Id.* at 19, 20.

[3] After spending almost three pages in a vain attempt to demonstrate this alleged "clarification," AMPI is reduced to urging an ultra vires standard. This is both different from the standard allegedly found in the *Sam Fox* dictum and meaningless as a practical matter, particularly since AMPI equates ultra vires with "outrageous conduct" and "failing to perform its [the Government's] discretionary duty." *See* AMPI Brief at 21 n.25.

to describing *Cascade* as "sui generis" and "limited to the distinct factual circumstances presented by that case." AMPI Brief at 17 n.20, 22.

Both the Government and AMPI further concede that the bad faith standard employed below is at odds with this Court's unanimous decision in *Trbovich* v. *United Mine Workers,* 404 U.S. 528 (1972). The Government tries to ignore the conflict:

> Since the Court of Appeals did not require a "conclusive showing" of government malfeasance or bad faith, petitioner's contention (Pet. 35-36) that such a standard would be inconsistent with *Trbovich* . . . is irrelevant. Government Brief at 9 n.11.

With all respect, this won't do. The basic inconsistency lies in the standard being applied, and not merely in the showing required to meet it. Of course, the decisions are in conflict with respect to the latter element as well. The court of appeals required that bad faith "must be shown" in order to obtain intervention (App. A at 9a), while *Trbovich* required a prospective intervener to show merely that the Government's representation "may be" inadequate, and emphasized that "the burden of making that showing should be treated as minimal." (404 U.S. at 538 n.10)

AMPI has a stab at distinguishing *Trbovich* on the ground that the antitrust laws give a private right of action while the Labor-Management Reporting and Disclosure Act involved in *Trbovich* did not. AMPI Brief at 28-29.[4] It is questionable which way the distinction cuts. The failure of Congress to provide a pri-

[4] This argument is addressed to how the present case should be decided, not to whether review should be granted.

vate right of action arguably indicates less concern for the private interest and a conscious decision to leave the matter entirely to the Government. And even if valid, the distinction would not suggest a different "standard" for intervention, but only a different factor to be weighed in deciding what constitutes "adequate representation."

AMPI also urges that certiorari should be denied because the decision below is the first by a court of appeals on the intervention issue. AMPI Brief at 25. AMPI's argument might have merit if the Petition presented a question of first impression. But it does not. This Court already has dealt with the matter in *Cascade, Sam Fox,* and a series of per curiam affirmances of divergent district court decisions, and the Court's certiorari jurisdiction is invoked on the basis of "the need for clarfying the implications of" this Court's decisions. *S.E.C.* v. *United Benefit Life Ins. Co.,* 387 U.S. 202, 207 (1967). Further handling in the courts of appeal will contribute nothing to resolution of the question because those courts will not approach intervention as a matter calling for their independent analysis, but rather as merely a matter of divining the meaning of this Court's decisions. That is precisely the way that the court of appeals dealt with the matter in this case.

AMPI also urges that the Antitrust Procedures and Penalties Act ("APPA") "has diminished the importance of the [intervention] issue" because the Act's procedures "will serve to heighten public awareness of and participation in the Government's consent decree proceedings." AMPI Brief at 31, 32. We submit that AMPI has it backwards. The increased public

awareness and participation to which AMPI refers surely will result in greater efforts at intervention because it is only through intervention that one obtains full standing and participation at the district court level and the right to seek appellate review. Indeed, without intervention in this case, the very reforms mandated by the APPA will go by the board because the only party interested in appellate review will have no standing to obtain it. *See, e.g.,* Petition 33-34.[5]

AMPI's argument that the Act's consent decree provisions are not applicable to this case (AMPI Brief at 12-13 & n.15) has nothing to do with the issues raised by NFO's certiorari petition.[6] The Act is relevant to these issues in two ways. First, its passage increases the importance of the intervention issue, as we just pointed out. This is true regardless of the Act's applicability to this case. Second, we have pointed to the Government's passive attitude toward implementation of the Act's reforms, particularly the requirement that a defendant reveal fully its political contacts relating to the case. *See* Petition at 8, 15-18.[7] The relevance of

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[5] We have not contended that the APPA "enlarged the scope of intervention as of right." Government Brief at 10. We have urged that the APPA was the product of Congressional concern about the Government's conduct in negotiating consent decrees, and intensified the significance of the intervention issue. We have also noted that an intervener may be the only one with an adversary interest in seeing that the APPA reforms are implemented and in pursuing the matter on appeal, a situation reflected in the record of this case. *See* Petition at 33-34, 38, 40.

[6] Of course, the substantive APPA issues (Petition at 19-20, 21-24) would have to be faced by the lower courts if intervention ultimately were granted under an appropriate standard.

[7] Even in this Court, the Government continues to assert its indifference to enforcement of § 2(g) of the Act. *See* Government Brief at 11 n.12 (the Act "places no duty on the government to vouch for a defendant's filing").

this passivity to the adequacy of the Government's representation does not depend upon the strict applicability of the Act, particularly since the Government has conceded that the Act is applicable and hence is an appropriate yardstick for measuring the quality of its representation.

AMPI's contention is frivolous in any event. Section 7 of the Act specifically provides that the revisions in the Expediting Act contained in § 3 do not apply "to an action in which a notice of appeal to the Supreme Court has been filed on or before the fifteenth day following the date of enactment of this Act."[8] In other words, the question of pending cases was specifically considered by Congress and a clearly defined and very limited exemption was spelled out. The proposed amendment (H.R. 9947) that AMPI says "would have specifically provided retroactive effect" (AMPI Brief at 13 n.15) in fact proceeded on the explicit understanding that the consent decree provisions already would apply to any case in which the decree had not become final prior to enactment. The amendment would have made these provisions also applicable to certain decrees entered "before the date of enactment of" the bill. *See* Hearings Before the Subcommittee on Monopolies and Commercial Law of the House Judiciary Committee, 93d Cong., First Sess. at 14, 46-48 (1973) (hereafter "House Hearings"). Finally, the decree in question was twice amended by the parties *after* enactment. R. at 679, 682.[9]

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[8] 88 Stat. 1706, 1710 (1974) 15 U.S.C. § 29 note (Supp. I 1976).

[9] Even under general principles of law, a remedial statute such as that here is deemed applicable to pending cases. *See, e.g., Bradley* v. *School Board*, 416 U.S. 696 (1974).

Both the Government and AMPI also seek to justify the failure to provide for the structural relief (*i.e.*, dissolution or divestiture) that is normal in monopolization cases. Government Brief at 3 & n.2; AMPI Brief at 27-28. Their arguments, however, have nothing to do with the need for clarification of the standard for intervention or even the selection of the appropriate standard. As we have pointed out (*e.g.*, Petition at 26-27), intervention is a preliminary procedural matter that cannot be made to turn on the substantive issue of approval of the decree. The failure to seek structural relief was merely one of the circumstances on which NFO relied to demonstrate the inadequacy of the Government's representation, a circumstance that would have to be evaluated under a proper standard. It is highly significant, in this connection, that the Government recognizes that the omission was unusual and requires justification.

AMPI makes a pass at arguing that the lower courts found that NFO had not satisfied the "interest" and "impairment" requirements of Rule 24(a)(2). AMPI Brief at 10-11. The Government, on the other hand, recognizes that neither of the lower courts so held. *See* Government Brief at 5-6. The court of appeals, whose judgment the petition seeks to bring before this Court for review, predicated its decision squarely upon the bad faith and adequacy of representation ground.[10]

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[10] As the court of appeals pointed out (App. A at 7a), the district court also based its denial of intervention on the bad faith rule derived from the *Sam Fox* dictum, and there is nothing to the contrary in the portions of the district court's opinion cited by AMPI (App. C at 36a, 40a). Indeed, there never was any legitimate issue about either the "interest" of NFO and its members or the practical impairment or impediment in their ability to protect that interest

In a similar diversion, AMPI says that NFO objected to the entry of "any" decree because it wished to have the benefit, in its private action, of a litigated judgment in the Government case. AMPI Brief at 8. The Government, less intrepid than AMPI, merely hints at the same point. *See* Government Brief at 7 n.6. AMPI's complaint, we submit, has nothing to do with the present Petition, but it does serve to underscore the dilemma faced by an applicant for intervention. Should an applicant have a personal interest and a private right of action, that is used, as here, to taint his intervention. But should he assert no personal interest and private claim, he is denied intervention. *See United States* v. *International Tel. & Tel. Corp.*, 349 F. Supp. 22, 26-27 (D. Conn. 1972), *aff'd per curiam sub nom. Nader* v. *United States*, 410 U.S. 919 (1973).

II. The Requirement of Discovery and an Evidentiary Hearing.

Should this Court ultimately decide that the bad faith standard applied by the court of appeals is the correct one, we have urged (Petition at 38-39) that the Court should clarify the extent to which an applicant for intervention is entitled to discovery and an evidentiary hearing in his attempt to satisfy such a stringent standard. The only portion of the Government's brief even remotely relevant to this question is the attempt to read into the opinion of the court of appeals a requirement that a prospective intervener need make only a "threshold" or "prima facie" showing of bad faith. We already have noted the ambigu-

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that might result from the entry of the decree. *See* Petition at 6-7. *See also Sam Fox Pub. Co.* v. *United States*, 366 U.S. 683, 694 (1961); Sullivan, *Enforcement of Government Antitrust Decrees by Private Parties*, 123 U.Pa. L. Rev. 822, 883-84 (1975).

ities in the Government's position, including whether the point is intended to relate to the standard for intervention or to the standard for granting discovery and an evidentiary hearing. *See* pp. 2-3, *supra*.

Assuming arguendo that the point relates to the hearing standard, the rule is the invention of the Government. The court of appeals never discussed the hearing issue; much less did it lay down a prima facie or threshold rule for its resolution. This omission was even raised in NFO's "Petition for Rehearing" (at 8-11), but the court again rejected it without comment even though it amended its opinion in another respect in response to the rehearing petition. *See* App. B at 12a. If the Government is indeed espousing a prima facie or threshold rule,[11] it is impliedly conceding both the error of the court of appeals and the need for clarification and guidance from this Court.

The main burden of the opposing briefs is really an effort to finesse the need for clarification of the hearing standard by suggesting that, on one pretense or another, a hearing is not required or would be unproductive in this case. We can only conclude that the Government and AMPI have taken this course because of their acute concern about the gap in the record stemming from the denial of a hearing. And, in fact, their points serve to underscore the importance of discovery and a hearing if a bad faith standard is to be employed. For example:

1. The Government and AMPI place their principal reliance upon an alleged admission by NFO regard-

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[11] The Government's approach would seem to call for a showing considerably stronger than the courts have required in the analogous situations cited at p. 39 of our Petition.

ing the integrity of certain of the Government's attorneys. In so doing, they seriously distort the record. The Government, for example, asserts that:

> . . . NFO admitted the good faith and honesty of the Government personnel who negotiated and proposed the decree. . . . Government Brief at 4.

With slight changes in phraseology, the Government makes this point several times. *E.g.*, Government Brief at 6, 8-9. AMPI, with its customary abandon, makes the point in even stronger terms. *E.g.*, AMPI Brief at 6, 17, 26.

Such an admission, had it been made, would be critical only if we assume the very point at issue—*i.e.*, that adequacy of representation under Rule 24 is to be judged by a "bad faith" standard. If the standard is otherwise, as we submit it should be, the point is of evidentiary value at most.

NFO, however, made no such "admission," as both the Government and AMPI know. The statement that they cite was strictly limited to the trial staff of the Antitrust Division, as the court of appeals recognized. *See* App. A at 9a. Indeed, when the district court had inquired whether NFO was claiming "bad faith or malfeasance within the meaning suggested in *Sam Fox Publishing Company*" (R. at 480), counsel for NFO responded:

> . . . Our brief does not purport to confer any absolution upon the Department of Justice for its conduct in this case. *We do believe that this Consent Decree may well represent the slap on the wrist for which AMPI bargained corruptly with the Government of the United States, and that is our position and we intend to adhere to it, and if*

> *given an opportunity for a full evidentiary hearing we will do our best to prove that point.* R. at 481 (emphasis added).

Declining to attack the integrity of the trial staff is a far cry from conceding the integrity and good faith of the "Government." It is not the trial staff who decides whether and what type of a consent decree will be accepted by the Government.[12] Indeed, in this very case the Government acknowledged that "Antitrust Division personnel in Washington" participated in negotiating the terms of the decree, that "superiors" of the staff approved the decree, and that "personnel of the Department of Agriculture" were consulted on the terms of the decree.[13] R. at 471. And even with respect to the trial staff, we have no way of knowing—since there has never been a hearing—what instructions they received from their superiors regarding negotiations with AMPI over the terms of the decree.[14]

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[12] *See, e.g.*, House Hearings at 201 (testimony of Professor Handler).

[13] A number of AMPI's contacts regarding settlement of the case were with Department of Agriculture personnel. *See* R. at 703-09. In what both the Government and AMPI concede to be a specialized field (Government Brief at 3 n.2; AMPI Brief at 27 n.34), the input of the Department of Agriculture presumably was of more than routine significance.

[14] AMPI's point about NFO's alleged failure to "question" the Government trial attorneys about the terms of the decree suffers from the same infirmities. Moreover, the alleged questioning related not to the intervention motion and the bad faith issue, but to the substantive terms of the decree (R. at 562-63), and consisted of legal argument, not testimony (R. at 569-91). Nor did NFO "decline" even this limited opportunity. After an Amicus had presented its questions about the terms of the decree, the court decided to abandon the "question-and-answer method of proceedings" in favor of written comments. R. at 598-99.

One final point. We have had no discovery or hearing on the bad faith issue, and we cannot say what they would reveal. We only know that the Government, seeking to neutralize the issue, has felt the need to stretch and distort NFO's position. This, we submit, is the most revealing and informative aspect of the Government's argument.

2. The Government also seeks by untested assertion to divorce the corrupt activity of 1971-73 from the consent decree proposed in the summer of 1974. Thus, it refers to "serious settlement negotiations" as having begun in January 1974. Government Brief at 2. Again, it argues that the district court "rightly concluded" that the events recited in the Watergate Report had not been connected with the "settlement of the case some years later." *Id.* at 9. *See also* AMPI Brief at 5-6, 26-28.

The alleged discreteness of the negotiations and the resulting decree does not go to the need for clarification of the standard or even to what the standard should be. It is purely evidentiary, and relevant if, and only if, the standard to be applied is actual misconduct in the formulation and acceptance of the decree. Even then, to consider the point conclusive as a matter of law would make it ridiculously easy to cover-up wrongdoing. A mere hiatus followed by additional cosmetic negotiations would completely mask the wrongdoing.

Of course, the relationship between the decree that surfaced in the summer of 1974 and the earlier agreement to fix the case in return for contributions[15] has

[15] There was concrete evidence in both the Watergate Report and the record of this case that AMPI actually had reached agreement with the Government, represented by Mr. Kalmbach, on a corrupt settlement of the case. *See* Petition at 12-13.

never been explored. We know only that the decree as proposed is suspiciously weak and fails to provide for the usual structural relief. We do not even know how the decree compares with the relief proposed by the Division during the "prefiling negotiations" that took place in January 1972 at the insistence of then Attorney General Mitchell. *See* Petition at 11-12.

AMPI's effort to divorce the decree from its corrupt activities contains a highly revealing and suggestive twist of its own:

> In January 1974, with different counsel representing AMPI, the parties began serious settlement negotiations which were different in character from the earlier talks. (R. 698) It was these later discussions that resulted in the proposed consent decree. . . . AMPI Brief at 5.

This is an amazing example of bootstrapping. The record citation upon which AMPI relies—"R. 698"—is to a letter written by AMPI's counsel in which he makes the same self-serving assertion now made in AMPI's brief.

AMPI's statement is also demonstrably untrue in one respect. AMPI's second statement of political contacts, reluctantly submitted in purported compliance with §2(g) of the APPA, reports (item 7 under the heading "Additional Contacts") that "E. C. Heininger and Sidney Harris" met with a Department of Agriculture attorney on 19 April 1973 to discuss the formulation of "pooling" guidelines "for possible use in drafting a consent decree." R. at 709. "Sidney Harris," we hasten to add, was also lead counsel for AMPI during the settlement negotiations that allegedly "be-

gan" in January 1974, and continues as lead counsel for AMPI in opposing certiorari.[16]

3. The Government next urges that NFO's complaint about the lack of an evidentiary hearing on the "bad faith or malfeasance" issue is without merit because "NFO, though invited by the court, had failed to produce or promise to produce any evidence of official impropriety beyond that contained in the Watergate Report." Government Brief at 6.

The question, however, is not whether NFO could point to "evidence of official impropriety" beyond that already a matter of record. It is whether NFO had made a sufficient preliminary showing to entitle it to discovery and an evidentiary hearing on the point, particularly when the "evidence of official impropriety" is peculiarly within the control of the very parties foisting the decree upon the court and opposing intervention.

The "Catch 22" aspect of the Government's position is illustrated by its treatment of the 1973 telephone call from the President's Special Assistant for Legislative Affairs to the Deputy Assistant Attorney General in the Antitrust Division about AMPI's desire to dispose of the suit through a consent decree. *See* Petition at 14-15. NFO informed the district court of NFO's desire to investigate thoroughly this highly suspect contact (R. at 714, 716), but the district court denied NFO the right to inquire into this or any other matter. The Government argues "that the call took

[16] The spring of 1973, when Mr. Harris was secretly promoting a consent decree on behalf of AMPI, was a time of considerable activity by AMPI directed at the same end. *See, e.g.*, R. at 705, 707, 709.

place months before the start of settlement negotiations, and that Deputy Assistant Attorney General Wilson rebuffed the caller." Government Brief at 9 n.9. Until the contact (and all others) has been fully explored via discovery and an evidentiary hearing, however, there is no way of knowing whether it influenced the decree or whether the call was in fact rebuffed.

Respectfully submitted,

WORTH ROWLEY
JOHN P. MCKENNA
RICHARD A. GREEN
AARON B. KAHN
ROWLEY & SCOTT
1990 M Street, N.W.
Washington, D.C. 20036
(202) 293-2170

Attorneys for Petitioner
National Farmers' Organization, Inc.

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